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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-401

DWIGHT L. CHAPIN, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The petitioner Dwight L. Chapin respectfully petitions this Court to issue a writ of certiorari to review the judgment and opinion entered in this proceeding on July 14, 1975, by the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the Court of Appeals, dated July 14, 1975, is reported at 515 F.2d 1274. It is reprinted in the appendix hereto, p. 1a, *infra.*

JURISDICTION

The petitioner, following a jury trial, in the United States District Court for the District of Columbia (Gesell, J.), was convicted of two counts of making "false material declarations" before a grand jury in violation of 18 U.S.C. § 1623. On appeal, the Court of Appeals affirmed the conviction on both counts, its judgment being entered on July 14, 1975. See p. 17a, *infra*. The petitioner did not file any petition for rehearing.

On timely application, the Chief Justice, on August 8, 1975, extended the time for filing this petition to and including September 12, 1975. This petition has been filed within that extended period.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution under 18 U.S.C. § 1623 for having made "false material declarations" in responding to questions asked at a grand jury inquiry into national political campaign activities, the defendant may raise the defense that the questions, while containing no First Amendment overtones, were vague and imprecise.

2. Whether 18 U.S.C. § 1623 permits a charge or a conviction thereunder for having falsely answered ambiguous questions asked by a grand jury interrogator where:

(a) The defendant gave true answers to the questions as he interpreted the questions; but

(b) The jury finds that the answers are false by ascribing to the defendant an understanding of a

different and what to the jury is a more reasonable interpretation of the questions; and

(c) The grand jury interrogator never sought to ask more precise follow-up questions, and never testified as to what he meant as to the questions he did ask.

3. Whether, particularly in light of the unprecedent nation-wide publicity accompanying what is loosely called the Watergate affair, a former White House official can be given a fair trial in the District of Columbia during the height of such publicity on widely-publicized charges of perjury containing political and racial overtones.

4. Whether, in the setting of such a prosecution, the defendant is entitled on the *voir dire* to inquire as to the political affiliations and preferences of the prospective jurors.

STATUTE AND RULE INVOLVED

18 U.S.C. § 1623

§ *1623. False declarations before grand jury or court*

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall

not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Rule 21(a), Federal Rules of Criminal Procedure

(a) *For Prejudice in the District.* The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

STATEMENT OF THE CASE

A. Introduction

Dwight L. Chapin, the petitioner, was Appointments Secretary to President Nixon from 1969 to March of 1973. He has never been charged with any participation in the notorious Watergate incidents.

One of Chapin's functions at the White House was to participate in political activities on behalf of the President. In 1971, he conceived the idea of hiring someone to play "political pranks" on the various contenders for the Democratic Presidential nomination in 1972, as the court below stated (p. 2a, *infra*), "with the aim of creating so much dissension among the candidates that they would not be able to unite effectively behind the party's nominee after the convention." His idea received the approval of H. R. Haldeman, the White House Chief of Staff. To execute the plan, Chapin then arranged for the hiring of one Donald

Segretti, a college friend, and instructed him generally about the types of activities he was expected to engage in. The evidence is undisputed that such instructions constituted simply a "master plan" for sowing dissension, the details and execution being left entirely to Segretti. Chapin cautioned Segretti that he should do nothing illegal.

Segretti engaged in a series of disruptive activities during the last part of 1971 and the early part of 1972, including the printing and distributing of false and vicious press releases and letters concerning various Democratic contenders. Chapin never authorized or anticipated the distribution of such libelous material by Segretti. The court below stated (p. 3a, *infra*) that "it is undenied that Chapin had nothing to do with the exact 'pranks' to be played and saw none of the items mentioned above before Segretti used them," but that "it is also clear that the latter regularly sent copies of his output to Chapin at home and that Chapin was aware of at least these documents shortly after they were used."

On April 11, 1973, Chapin was called before a federal grand jury in the District of Columbia investigating the so-called "dirty tricks" that had been executed by Segretti. More specifically, the grand jury was inquiring whether Segretti and others had violated 18 U.S.C. § 612, punishing whoever "distributes or causes to be distributed" campaign statements without properly identifying the persons or groups responsible for them. At that time Segretti was not cooperating with the Government and had not supplied the details of his activities to any prosecuting agency. Segretti later appeared as a Government witness, however, at Chapin's trial.

On November 29, 1973, Chapin was indicted on four counts of having made "false material declarations" in his appearance before the grand jury, in violation of 18 U.S.C .§ 1623. That section is a relatively new one, having been enacted as a part of the Organized Crime Control Act of 1970.

Trial by jury began on April 1, 1974, in the District Court, Judge Gesell presiding. Count Four, which alleged that Chapin had testified falsely about his knowledge of the arrangements for paying Segretti, was dismissed by Judge Gesell at the end of the Government's case. And the jury, in returning its verdict on April 5, 1974, acquitted Chapin of Count Two, which dealt with his grand jury testimony concerning his advice to Segretti when the latter was called by the FBI.

The jury, on a special verdict, also acquitted Chapin on the first of the two "false material declarations" alleged in Count One. But the jury found Chapin guilty as to the second "declaration" contained in Count One, as well as to the single "declaration" contained in Count Three. Judge Gesell sentenced Chapin to two concurrent terms of from 10 to 30 months imprisonment. Chapin is currently serving that sentence.

On appeal, the Court of Appeals for the District of Columbia Circuit unanimously affirmed the conviction as found by the jury.

B. The Alleged "False Material Declarations"

The facts that are said to support the conviction are set forth in the opinion below and need not be repeated here. But it is essential to reiterate the alleged "false

material declarations" for which Chapin stands convicted, and to contrast the opposing views of the defense and the Government respecting the vagueness of the declarations and the proof of their falsity. The declarations themselves consist of questions put to Chapin during the grand jury inquiry and Chapin's responses thereto. Both the questions and the responses appear below in bold face type.[1]

The Count One "declarations"

Count One alleged that Chapin made two false "declarations," but the jury found Chapin innocent of having falsified the first of them. Because the first "declaration" immediately precedes the second one in Chapin's grand jury colloquy and is intimately related to the second "declaration," the first question and response bear repetition:

Q. Did you ever discuss in any way with Mr. Segretti the distribution of any campaign literature or statement of any kind?

A. No.

That negative response, which the jury found truthful, was immediately followed by a question and answer that together constituted the "declaration" in Count One, which the jury found to be false:

Q. To your knowledge did Mr. Segretti ever distribute any statement of any kind, or any campaign literature of any kind?

A. Not that I am familiar with.

---

[1] The references herein to "App." are to the Joint Appendix filed in the court below.

Chapin's claims	*Government's claims*
Chapin claimed that the question was vague and ambiguous, since the word "distribute" is subject to a number of possible interpretations, i.e., it might mean (1) personal acts of distribution by Segretti himself, such as passing out the campaign literature on a street corner or from house to house; or (2) acts of distribution by others operating at the direction of Segretti.	The Government denied that the word "distribute" is inherently vague or ambiguous, that it simply means the act of making something "available to others." In support of that interpretation of the word, the Government cited Chapin's own definition of the word given in response to his counsel's question at trial as to what the word "distribution" means "with respect to advertising or campaign literature." App. 306. Chapin replied:
Chapin claimed that, at the time of his grand jury appearance, he understood the question to refer only to personal acts of distribution by Segretti. On that premise, even the court below acknowledged (p. 6a, *infra*) that Chapin's "not . . . familiar with" response was truthful. That truthfulness was found in Segretti's trial testimony. App. 197-198. As summarized in the opinion below (p. 6a, *infra*), "While Segretti testified at the trial that he actually had, contrary to Chapin's instructions, passed things out to 'consumers' directly, he also stated that he had not told Chapin of those instances, and there was no indication that Chapin had found out about them otherwise."	"The word 'distribution' means to me the method by which something goes from the point of production to the hands of the consumer. It deals with the channels by which it goes, the economics of how it is handled, how it is merchandized, that kind of a context." Thus the Government interpreted Chapin's grand jury response as a denial that he was aware that Segretti was by any method making the campaign literature available to others. On that premise, the Government argued that the evidence was clear that Chapin was fully aware that Segretti was involved in the

Chapin's claims	*Government's claims*
At the trial, Chapin testified that he was "not familiar with anything that Mr. Segretti distributed personally." App. 306.	printing and distribution of fictitious campaign literature among rival Democratic presidential hopefuls, having discussed it with him and received numerous samples of it. The evidence was also said to be clear that Chapin was aware of these activities at the time he testified before the grand jury; hence his response was false.
Chapin's understanding was consistent with the distinction in 18 U.S.C. § 612, toward which the question was asked, between one who "distributes" and one who "causes [material] to be distributed."	

The Count Three "declaration"

The "declaration" contained in Count Three, which the jury declared false, is found in Chapin's response to the following question:

Q. Did you ever express any interest to him [Segretti], or give him any directions or instructions with respect to any single or particular candidate?

A. Not that I recall.[2]

[2] The above question and answer came immediately after the following colloquy, which was also set forth in Count Three:

Q. What candidates do you recall receiving information about-Senator Muskie—was he one?

A. Yes. I think virtually Muskie and Humphrey, Wallace.

Q. Senator McGovern?

A. Jackson, McGovern. I think virtually all of them. I forget now who all the candidates were. I think that covers it.

Q. At one time or another during this period of time, in the early months of 1972, you received information from Mr. Segretti relating to all these candidates?

[cont'd next page]

Chapin's claims	*Goverment's claims*
Chapin claimed that this was a two-part question, separated by the disjunctive "or." In Chapin's view, the Government never proved which part of the question Chapin responded to or intended to respond to. The Government, in cross-examining Chapin at the trial, did not ask him which part of the question he had in mind when he responded "Not that I recall."	The Government denied Chapin's claim that, if the question be deemed to be a two-part inquiry, the Government must prove that the response was false as to both parts. But even on the assumption that it was a two-part inquiry, the Government claimed that the evidence showed that Chapin's response was false as to both aspects of the question.
As to the first part of the question, Chapin claimed that the phrase "express any interest" was impermissibly vague and was subject to a number of possible interpretations. The phrase "give him any directions or instructions" in the second part of the question was also alleged to be vague.	When read as a whole and in the context of the immediately preceding questions (see footnote 2, below), said the Government, "this question very plainly asked whether Chapin ever gave Segretti any instructions about or expressed any interest in *specific* candidates, without reference to whether Chapin was telling him to ignore all others." Govt. Brief, p. 31.
The phrase "any single or particular candidate," which was common to both parts of the question, was said reasonably to mean one particular candidate to the exclusion of all others. And Chapin was said to have had that meaning in mind when	As proof that Chapin's response was false, the Government pointed to the testimony of Segretti that (1) at one of their early meetings, Chapin told him that "Senator Muskie was the

A. As I recall, two of them may be mentioned in one little note or something. But they were not documents or reports—what you and I would consider reports.

None of those statements was alleged to be false. They merely supply the context in which the allegedly false "declaration" was made.

Chapin's claims	*Government's claims*
he disclaimed recalling any interest or instructions with respect to a particular candidate, such as Senator Muskie. Segretti himself testified that the general purpose or master plan of his activities was to create dissension among all the Democratic candidates as a group, rather than to concentrate on any particular one. App. 101. Thus when, after a series of questions that referred to at least four of the candidates (see footnote 2, *supra*), Chapin was asked if he had expressed or if he had particularized his interests or instructions as to any one of them, Chapin had in mind "only that there was no master plan against any particular candidate that Mr. Segretti dealt with." App. 295. As the question was interpreted by Chapin, the Government did not prove that his response was false. Indeed, the court below acknowledged (p. 8a, *infra*) "that if this were in fact the meaning Chapin had given to the question, his answer was true."	one that I should concern myself with primarily" (App. 105); (2) Chapin suggested that at a Nixon rally "it would be a good idea" to have a disheveled individual holding a "Muskie for President" sign (App. 113); and (3) in March of 1972, when Senator Muskie was no longer a front runner, Chapin told him "that I should concentrate my efforts towards fostering a split between the staff or the candidates of Senator Humphrey and Senator Muskie" (App. 165). See also opinion below, p. 8a, *infra*.

C. The Charge to the Jury

On the issue of the falsity of Chapin's responses to the foregoing questions, and his intent in so responding, Judge Gesell charged the jury as follows (App. 328-329):

> As to the second element, you are instructed that in order to convict the Defendant of a particular charge, you must conclude beyond a reasonable doubt that the declaration you are considering was in fact false.
>
> A statement is false if you find it to be contrary to the facts as you find them. An answer to a question is not false if it is literally true and technically responsive. If the response was literally true, it makes no difference if it may have been incomplete or misleading.
>
> A declaration is literally true and not false if, no matter how narrowly or partially truthful, it responds to a reasonable interpretation of the question, if that interpretation could have been reasonably held by the person answering it at the time.
>
> It makes no difference that a truthful literal answer may or may not have been chosen to mislead or to avoid fuller disclosure.
>
> If a question is reasonably susceptible of two different interpretations, a response is not a false declaration unless it is shown beyond a reasonable doubt to be false under both possible reasonable interpretations of the question.
>
> You are not to isolate the particular questions and answers listed in the indictment from the context in which they appear. The meaning and thrust of the questions and of the answers must be judged in the light of the general course of the examination as a whole and particularly as it had proceeded to the point before the answer was given.
>
> Third, if a declaration is shown to be false beyond a reasonable doubt, the Defendant may not

> be found guilty unless it had also been shown beyond a reasonable doubt that the Defendant at the time he answered knew the answer to be false. This is basically a matter of what was in his mind, his intent. Did he know his answer was false? Did he act on purpose, wilfully, or did he act because of mistake, inadvertence or accident? By inadvertence, I mean to include carelessly or because of an inability, a genuine inability to remember.

No objections were made to the foregoing charge, and Chapin has made no claim that the charge, as far as it went, was in any way erroneous or inadequate. In its brief to the court below, the Government claimed (Brief, p. 23) that Judge Gesell, in the above quoted portions of the charge, erroneously gave Chapin a benefit to which he was not entitled—i.e., he charged "that, without regard to how the defendant actually understood the question, they should acquit him if his answer was a literally truthful response to *any* reasonable interpretation of the question."

Based upon the foregoing charge, the jury found that Chapin gave a true answer to the first question set forth in Count One, but that he gave false answers to the second question set forth in Count One and to the question set forth in Count Three.[3]

---

[3] Chapin argued in the court below (Brief, p. 13, note 2) that "the verdict pattern of acquittal and conviction on Count I is so mystifying and irreconcilable that as a matter of common sense it supports an entry of judgment for Chapin." If, as the jury found, Chapin truthfully said "no" when asked if he ever discussed in any way with Segretti the distribution of any campaign literature of any kind, how could his answer be false in denying knowledge that Segretti ever distributed such literature? Chapin was clearly never present when Segretti made a distribution. App. 198. Nor was there any evidence that Chapin ever learned from third parties about Segretti's distribution activities.

D. The Change of Venue Motion

Prior to trial and before the jury was selected, Chapin moved for a change of venue under Rule 21(a) of the Federal Rules of Criminal Procedure. This motion, which Judge Gesell denied, alleged that the case was so political in nature and that the pre-trial publicity was so prejudicial that Chapin could not get a fair trial in the District of Columbia, where the crime was committed.

As the court below recognized (p. 12a, *infra*), there were two distinct branches to Chapin's change of venue claim. The first, in the court's words, was that because of Chapin's "connection with the Nixon administration and his participation in a 'dirty tricks' campaign aimed at Democratic candidates and with racial overtones, a truly fair and impartial jury could not have been drawn from the District's heavily black, and overwhelmingly Democratic, population." To support that contention, Chapin offered an affidavit and testimony, at a pre-trial hearing, of Dr. Elvin Mackey, Jr., Director of Minority Group Program Development of the American Psychiatric Association. App. 38-54. To quote again from the opinion below (p. 12a, *infra*),

> "Dr. Mackey stated that, because the heavily-black District had been denied home rule and because of the Nixon administration's policy of 'benign neglect,' prospective black jurors would have a 'normal human reaction' of hostility toward the Nixon administration and those associated with it—coupled with a tendency to suppress such feelings when asked about them."

This documented claim was made at a time when the Government had already announced that it intended to offer at the trial highly inflammatory material prepared

by Segretti that would be politically offensive to Democrats and racially offensive to Blacks.

In denying this aspect of the venue motion, Judge Gesell remarked that Dr. Mackey's testimony, as well as the motion, was "in some respects an affront to the jury system." App. 57. He added that "the suggestion that juries do not rise to the standards that are expected of a good citizen in a community is just wrong . . . . and I have the utmost confidence that we can and will select in this case an impartial jury." App. 57. The Court of Appeals below agreed with Judge Gesell's sentiments, and added that "Chapin's role in both the administration and the wrongdoings in which it was engaged was small; testimony on his behalf at trial emphasized that his job was almost entirely administrative with no policy responsibilities," and that the crime with which Chapin was charged "was not, unlike that to which Segretti pled guilty, directly related to anti-Democratic activities." See p. 13a, *infra*. Moreover, said the court below, Dr. Mackey's testimony failed to take cognizance of the possibility "that there might be a distinction between a potential juror's feelings as to Richard Nixon himself and one of his minor functionaries," and of the fact "that, while there may be more blacks on District of Columbia juries than on juries in other federal district courts, juries in this city are not all black, and the jury in this case was in fact split almost evenly along racial lines." See p. 13a, *infra*.

The second branch of the venue motion was that the publicity about Chapin and his activities was so great that it was unlikely that any jury in the District of Columbia could put aside the resulting prejudice

against him and decide the case on the basis of the trial evidence. This claim, as Judge Gesell recognized (App. 55), was essentially "whether or not a fair trial can be given to this particular Defendant."

This second aspect of the venue claim stemmed in part from the evidence submitted as to the unprecedented publicity about the so-called Watergate affair, a national phenomenon to which Chapin's indictment was unfairly but effectively tied. Even Judge Gesell allowed this case to fall into the "Watergate syndrome". While he cautioned the prospective jurors that "there are no accusations made against Mr. Chapin which in any way involve him in the more prominent Watergate matters that you may have heard something about, such as the break-in in the Democratic Headquarters, or any kind of cover-up," he also advised them that this case was "one of a number of cases that has been brought by the Special Prosecutor arising out of what is very loosely called Watergate." See App. 61, 66.

Evidence was also submitted as to the extent of the prejudicial publicity that arose from the indictment of Chapin alone, particularly in the District of Columbia. Judge Gesell, in denying the venue motion, ruled that the issue was not the quantity of such publicity but the quality thereof. App. 56. In his words,

> "Certainly there is no indication that the publicity with respect to the events that have attracted national attention, of which this is a miniscule part, have had a single-minded, inflammatory, vitriolic or vicious aspect, such as were present in Sheppard, which counsel referred to. Every possible point of view, opinion, qualification about aspects of this case have been expressed frequently on the

> same page of the newspaper by different columnists or frequently as between the news article on the first page and the editorial on the inside. There is no common view about any aspect of this case that the Court, as a citizen, is aware of; and certainly no common view in the newspapers with respect to the matter." App. 56-57.

The Court of Appeals below added its own analysis of the pre-trial publicity about Chapin's case, relegating it to the status of an inside-page newspaper story. As the court put it (p. 15a, *infra*):

> "While appellant's upcoming trial attracted some newspaper attention, the articles were not front-page stories, frequently mentioned the trial only in passing, and a large number concentrated on John Dean's role as a witness rather than Chapin's role as defendant. Those stories which were exclusively about the trial were factual accounts of motions filed by the defendant and proceedings in open court. Editorial comment, to the extent there was any, was essentially sympathetic, deploring the possibility that of all the White House staff members, only Chapin, and not those more responsible for Watergate and the cover-up, was likely to be brought to trial and convicted. In addition, the publicity was at its height during January and February, 1974, and had decreased substantially by the time of trial in April. The Washington Post appears from the record to have carried no story about the trial the day it started."

Thus did the motion for change of venue die. While Chapin never requested that Judge Gesell consider the lesser remedy of granting a continuance to allow the publicity to die down, it was readily apparent that Judge Gesell preferred to rely on the *voir dire* as the

mechanism to uncover any prejudice that prospective jurors might have absorbed from the pre-trial publicity.

E. The Voir Dire Questions

As a part of Judge Gesell's *voir dire,* prospective jurors were asked whether they believed that their own connection or that of a close friend or relative with a political party, particularly during the 1972 Presidential campaign, would prejudice them for or against Chapin. They were also asked whether they or their relatives had worked in the 1972 campaign for the Committee to Reelect the President.

But Judge Gesell declined to ask nine questions submitted by Chapin's counsel, on the theory that the Constitution barred him from asking such questions. App. 90. Actually, one of the questions was asked by the court as a part of its own *voir dire.* But the Court of Appeals below found that six of the questions "might in fact raise First Amendment problems, in that they asked who jurors had voted for, which political parties they had contributed to, worked for, etc." See p. 16a, *infra.* Those six questions were (App. 59):

1. Has anyone made a contribution to a political party in the last four years and, if so, to which party?
4. Has anyone or a relative worked or performed services for a political candidate in the last ten years?
5. Has anyone voted in any election or primary for George McGovern, Edmund Muskie, Hubert Humphrey, Shirley Chisholm or Henry Jackson?
6. Has anyone voted for Walter Fauntroy for any office?

7. Has anyone been a registered Democrat for any one of the past four years?
8. Has anyone been a registered Republican for any one of the past four years?

The court below stated that, because of modern election laws, the questions numbered 7 and 8, which were the only two emphasized on the appeal, "should have been asked." Voter registration lists in the District of Columbia are public and are accessible, and thus "the constitutional basis for denial of these particular [two] questions is not as clear as for the others." See p. 17a, *infra*.

But the Court of Appeals concluded that Judge Gesell did not abuse his discretion in declining to ask questions 7 and 8 since (1) they were buried in a list of much more questionable ones, (2) Chapin's counsel, when faced with Judge Gesell's constitutional reason for denying all the questions, did not single out Nos. 7 and 8 as constitutionally permissible, and (3) there was a substantial *voir dire* on political bias and prejudice. See p. 17a, *infra*.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. Important Problems Are Raised Under a New Statute, 18 U.S.C. § 1623, as to the Extent to Which the Vagueness or Ambiguity of the Inquiries Establishes a Defense to a Charge of Having Made "False Material Declarations"

This case affords the first opportunity for this Court to chart the contours of a new, important and potentially confusing federal perjury statute, 18 U.S.C. § 1623.

That statute, enacted in 1970 as a part of the Organized Crime Control Act, is a far-reaching addition to the perjury laws of the United States, expressly de-

signed to circumvent the two-witness rule that adheres to the general perjury statute, 18 U.S.C. § 1621.[4] In effect, the new § 1623 abolishes the two-witness rule as to perjury committed before "any court or grand jury of the United States," and leaves the two-witness rule to be applied under § 1621 as to perjury committed before any other competent tribunal, officer or person "in any case in which a law of the United States authorizes an oath to be administered."

Under any circumstances, a "perjury statute is not to be loosely construed." *Bronston* v. *United States*, 409 U.S. 352, 360 (1973). But particularly because this perjury statute, § 1623, has abolished the traditional safeguards of the two-witness rule, the construction accorded it should be carefully limited so that the lack of the "questioner's acuity" does not become the basis of a federal perjury prosecution. *Ibid*, 362. It is essential that federal courts, grand juries, prosecutors and prospective witnesses know precisely what can be found, under the relaxed standard of proof, to be a "false material declaration" within the scope of § 1623. Guidance from this Court is especially desirable at this early date, before § 1623 becomes encrusted with the confusion and conflict that have surrounded much of the history of § 1621. The new statute, in short, needs authoritative delineation during its formative years.

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[4] Like § 1621, the new § 1623 is a part of Chapter 79 of the Criminal Code, which is entitled "Perjury." Subsection (e) of § 1623 states that proof beyond a reasonable doubt is sufficient for conviction under § 1623 and that it "shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence." In contrast, of course, a conviction cannot be had for perjury under § 1621 "on the uncorroborated oath of a single witness." *Weiler* v. *United States*, 323 U.S. 606, 611 (1945).

The opinion below has injected into § 1623 some of the doctrines and precedents established under the older § 1621. Obviously, not all of those doctrines and precedents are irrelevant to § 1623, but some of them, unfortunately, are confusing, contradictory and dubious. It would be unfortunate if § 1623 were to be tarred with such litigious ambiguities as are evident in the opinion below.

An appropriate vehicle for avoiding that result can be found by reviewing the opinion below. The opinion of the District of Columbia Circuit marks the first significant attempt by an appellate court to deal comprehensively with the critical perjury components of § 1623. And the opinion has been rendered by a court before whom recur many of the most significant perjury prosecutions in the country.

The problems and questions that arise from the opinion below must, at the outset, be viewed in light of the particular way in which the "false material declarations" were uttered by the petitioner Chapin His declarations did not take the form of his own simple declaratory statements, from the four corners of which could be deduced his truthfulness, his understanding and his intent. Rather, his declarations took the form of two short responses to questions: (1) "Not that I am familiar with," and (2) "Not that I recall." The truthfulness of those responses, of course, can be assessed only if the interrogator's questions are incorporated into the responses. Indeed, the questions themselves become, for most purposes, the critical features of the "false material declarations" and lead to the important problems and questions in this case. Such problems that stem from the questions are those that this Court adverted to but found unnecessary to decide,

in the setting of a § 1621 prosecution, in *Bronston* v. *United States,* 409 U.S. 352, 356-357 (1973).[5]

Within the foregoing context, the following questions are apparent from the opinion below, questions that fully justify the grant of certiorari in this case:

(1) To what extent can vagueness and ambiguity in the questions asked of a witness establish a defense to a § 1623 charge of making a "false material declaration?" That perhaps is the basic question left unanswered by this Court in *Bronston* with reference to § 1621, and it is a question that now needs to be answered with reference to § 1623. The court below, citing a § 1621 case,[6] stated that such a defense was limited to questions of an ambiguous nature that have First Amendment overtones, though it conceded that there may be "some questions without First Amendment overtones . . . so vague as to prohibit the government from even attempting to prove that the defendant answered falsely." See pp. 4a-5a, *infra.* This case presents the unresolved question whether the defense of impreciseness also goes to questions that have obvious political overtones.

(2) Does the fact that the vagueness of a question becomes apparent only "when subjected to ingenious

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[5] In *Bronston*, this Court held that § 1621 does not permit a conviction of perjury for an answer, under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication. The Court stated, however, that "The problem of the ambiguity of the question is not free from doubt, but we need not reach that issue." 409 U.S. at 356.

[6] The court below stated that it could find only one case, involving § 1621, in which a perjury indictment was dismissed for vagueness in the question. That case is *United States* v. *Lattimore,* 127 F.Supp. 405, 409 (D.C.D.C. 1955), aff'd by equally divided court, 232 F.2d 334 (App. D.C. 1955). The questions there were both vague and highly charged with First Amendment problems.

scrutiny after the fact" operate to destroy the existence of vagueness? The affirmative answer given by the court below to that query (p. 5a, *infra*) is at best dubious. Why should such an after-the-fact scrutiny be deemed impermissible if a true ambiguity comes to light? Can it be that the obligation to uncover the ambiguity is that of the witness, appearing at a grand jury hearing without counsel and making on-the-spot scrutinies? How else can an ambiguity be detected other than after-the-fact?

(3) If such after-the-fact scrutinies are barred, is it enough to say that the imprecise questions are "subject to a reasonable and definite interpretation by the jury"? Answering that query in the affirmative (p. 5a, *infra*), the court below cited another § 1621 case that held that while certain words may connote different meanings in different situations, if they are "precisely defined in dictionaries" and are "terms of common usage" they become subject to "a reasonable and definite interpretation by the jury." *United States* v. *Marchisio*, 344 F.2d 653, 661-662 (C.A. 2, 1965). Does that mean, then, that a jury must retire to its deliberations armed with a dictionary and a thesaurus? Or is a jury supposed to speculate as to the precise definition of the words used? Or is it supposed to rely on some "ingenious scrutiny after the fact" supplied by witnesses, counsel or the court? This Court said in *Bronston*, 409 U.S. at 359, that a jury "should not be permitted to engage in conjecture whether an unresponsive answer . . . was intended to mislead or divert the examiner." Why, then, should it be permitted to engage in conjecture as to which of several dictionary meanings was really attached to the words used in the examiner's question?

(4) Can a jury be allowed to determine from extrinsic evidence what the defendant subjectively understood was in the interrogator's mind? Is § 1623, with its abolition of the two-witness rule, to be applied so that a jury can simply ascribe to the defendant an understanding that he did not in fact have, thereby making the jury's opinion a substitute for the interrogator's obligation to ask more precise follow-up questions?

(5) If an ambiguity does lie within a question, why does it not become the obligation of the Government to prove what meaning the interrogator intended to attach to the question? The court below did not address itself to that problem. But the Fifth Circuit in *Van Liew* v. *United States,* 321 F.2d 674, 682-683 (C.A. 5, 1963), has held that there is just such an obligation where two plausible interpetations can be placed on what the interrogator meant in asking the question. As the court there said:

> "Assuming that perjury could nonetheless be committed in such context, the deficiency of the proof here is demonstrated by considering what the Government would have to establish in that setting. It would have to establish that (a) the interrogator used the words with the meaning intended by the Government, and that (b) the swearer knew (i) the sense in which the interrogator used the words and (ii) nevertheless intentionally gave an answer which he knew to be false to the question as thus put in the sense thus intended."

The *Van Liew* decision cannot be squared with the result reached in this case.

(6) Indeed, why should a perjury prosecution be permitted under either § 1621 or § 1623 if the interrogator asks a question that is subject to various reasonable interpretations? Is not a governmental examiner under an obligation, for purposes of applying these perjury statutes, to ask precise questions that admit of no doubt as to what is being asked? In *Bronston,* this Court unanimously held that "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry" and that "Precise questioning is imperative as a predicate for the offense of perjury." 409 U.S. at 360, 362. Those holdings would seem to outlaw the ambiguous and imprecise question as a predicate for a perjury prosecution under § 1621 or § 1623. Otherwise, it becomes grossly unfair and unjust to convict a defendant because he misunderstood which of several meanings the interrogator attached to his question, or made a wrong guess as to which of several meanings the jury later thinks is the most reasonable interpretation. The defendant is left in an impossible situation, for it is impossible to defend one's actions against another man's interpretations.

What the Sixth Circuit said in *Wall* v. *United States,* 371 F.2d 398, 399-400 (C.A. 6, 1967), would appear equally applicable here:

> "The trouble with this case is that the question upon which the perjury charge was based, was inarticulately phrased, and, as admitted by the prosecution [not true in the instant case], was susceptible of two different interpetations. In our opinion, no charge of perjury can be based upon an answer to such a question."

See also *Smith* v. *United States*, 169 F.2d 118 (C.A. 6, 1948); *Galanos* v. *United States*, 49 F.2d 898 (C.A. 6, 1931), both cited in the *Wall* decision.[7]

The instant case is a perfect example of premising a perjury conviction on imprecise questioning, no attempt having been made to ask more precise follow-up questions. The interrogator could easily have asked Chapin the precise questions which the Government and the jury now say Chapin should have understood were being asked. For example:

(a) If the interrogator did not mean to ask whether Chapin knew of any personal distribution of political material by Segretti, as Chapin understood, the interrogator could simply have asked the precise question whether he knew if Segretti had ever directed others to distribute such material. In so doing, the interrogator would have been tracking the clear and precise distinction drawn by the very statute underlying the grand jury inquiry, 18 U.S.C. § 612. That statute expressly draws a line between one who "distributes" political material and one who "causes [material] to be . . . distributed."

(b) If the interrogator was really interested in Chapin's instructions about particular candidates, he

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[7] The *Wall* case, which arose under § 1621, was distinguished by the court below on its particular facts (pp. 5a-6a, *infra*):

> "In Wall, the interpretation argued for by the defendant was in fact more reasonable and usual than that urged by the government. The defendant had answered 'I have not.' to the question 'Have you ever been on trips with Mr. X?' The evidence showed that, while Wall had been in Florida with Mr. X, she had not travelled with him to Florida. Since the government did not prove that Wall interpreted the question when it was asked in the first sense rather than the more usual second meaning, the conviction was reversed."

could simply have asked about Senator Muskie or Senator Humphrey by name. Instead, his compound question, with its emphasis on some unnamed "single or particular candidate," misled Chapin into thinking that the inquiry was whether the general master plan of causing dissension among all Democratic candidates hod somehow changed into a general plan of causing embarrassment to some particular candidate, to the exclusion of his competitors. Had there been precise follow-up questions, the interrogator would have elicited the precise information he apparently was seeking.

The record thus squarely presents the question whether § 1623 is to be applied so as to make imprecision in the questions the predicate of a perjury prosecution.

2. Important Problems Are Raised as to Whether a Former White House Official Can Get a Fair Trial in the District of Columbia during the Watergate Era on Widely Publicized Perjury Charges, Containing Political, Racial and Watergate Overtones.

This case presents unprecedented, important and troublesome problems in the administration of criminal justice in the federal courts, particularly those in the District of Columbia. These are problems that are likely to come again before the Court if and when those directly involved in the Watergate crimes seek review of their convictions.

(1) The critical problem that needs consideration by this Court is whether any official in the Nixon Administration, and especially one who served on the White House staff, could obtain a fair trial on any charge brought in the District of Columbia during the height of the Watergate crisis in 1974. It is a prob-

lem epitomized by Judge Gesell's reminder to the prospective jurors that the instant case, though divorced from direct involvement in the Watergate scandal, was "one of a number of cases that has been brought by the Special Prosecutor arising out of what is loosely called Watergate." See App. 61, 66.[8]

This problem rises above and beyond the normal considerations that prompted the court below to dismiss Chapin's objection—i.e., the lack of any overt prejudice, the minimal and seemingly fair-handed press coverage of the instant proceeding, and the extensive *voir dire* on matters of bias and prejudice. And it is not a problem to be solved by reference to the prior decisions of this Court that have established standards, constitutional and otherwise, for dealing with individualized and localized instances of flamboyant prejudicial publicity. See, e.g., *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Estes* v. *Texas,* 381 U.S. 532 (1965). Thus the reference by the court below to *Beck* v. *Washington,* 369 U.S. 541 (1962), is not very helpful, for that decision was premised solely on Fourteenth Amendment considerations and did not deal with anything like the pervasive and subtle psychological impact of "what is loosely called Watergate" on the national conscience. Part of that impact was necessarily expended upon the conceptions and attitudes of those citizens chosen for jury duty in the District of Columbia. That impact simply defies capture within

[8] The flood of Watergate publicity was so intense, particularly in the District of Columbia, that Attorney General Richardson and Special Prosecutor Cox publicly expressed fear that such publicity would likely create jury preconceptions about pending criminal cases. New York Times, June 5, 1973, at 26. The instant case became such a "pending case" on November 29, 1973, when the indictment was returned. The trial began on April 1, 1974.

the conventional norms for assessing undue influence upon jurors; it can be perceived only through a judicial notice and appreciation of the universality of the thrust of Watergate. If there was jury prejudice here, it was an inherent prejudice stemming from the totality of the Watergate publicity.

But the answer, if there be one, must be found within the unique jurisdiction of this Court. As most recently articulated last term by the Chief Justice, that jurisdiction authorizes "the exercise of our supervisory powers" over lower federal courts. *Murphy* v. *Florida,* No. 74-5116, 43 U.S. Law Week 4730, 4733 (June 16, 1975, concurring opinion).[9] Those powers of supervision incorporate but go beyond ordering compliance with the constitutional standards of a fair trial. Proceedings may be halted or transferred or dismissed, in the exercise of this Court's powers, because of what the Court deems to be inherent prejudice or unfairness below the level of constitutional violations.

These powers, then, are largely resident in this Court, permitting this Court to determine whether, because of inherent prejudice in the District of Colum-

[9] In *Murphy,* a state court jury had been exposed to information about the notorious defendant's prior convictions and about the crime for which he was being tried. His flamboyant life style and his numerous arrests had drawn extensive press coverage over a period of years. This Court held that his constitutional right to a fair trial had not been violated, since the *voir dire* showed no hostility to the defendant and since, in the totality of circumstances, no *inherent or actual prejudice* was evident.

The Chief Justice concurred only because the circumstances did not rise to the level of a Fourteenth Amendment due process violation. But he stated that "I would not hestitate to reverse petitioner's conviction in the exercise of our supervisory powers, were this a federal case." 43 U.S. Law Week at 4733.

bia, such a trial as Chapin's should have been removed to another federal jurisdiction or delayed until the Watergate phenomena receded with the Presidential resignation in August of 1974. Those are the powers of supervision that the petitioner here asks that this Court invoke. See *Marshall* v. *United States,* 360 U.S. 310, 313 (1959).

(2) A related problem posed by the decision below concerns the denial of the change in venue claim, presented under Criminal Rule 21(a), that because of Chapin's "connection with the Nixon administration and his participation in a 'dirty tricks' campaign aimed at Democratic candidates and with racial overtones, a truly fair and impartial jury could not have been drawn from the District's heavily black, and overwhelmingly Democratic, population." See opinion below, p. 12a, *infra.* This claim was bolstered not only by testimony but by the expressed intent of the prosecution to introduce at the trial the blatantly racist and highly partisan material fabricated by Segretti. That material, which was in fact introduced, could only have had a prejudicial impact on jurors chosen from the District of Columbia.

Here again, the normal rules for assessing jury prejudice cannot be applied. The problem must be considered a component of those that are involved in the exercise of this Court's supervisory powers over the federal courts. Particularly is that so since Chapin's employment at the White House and his alleged connection with Segretti's vicious and racist distributions were undoubtedly why this case became in the jurors' minds a part of "what is loosely called Watergate."

(3) Finally, the decision below raises a significant problem reserved by this Court some 80 years ago in *Connors* v. *United States,* 158 U.S. 408 (1895). The Court there held that it was within the discretion of a federal trial judge to disallow a *voir dire* question concerning the juror's "political affiliations or party predilections" unless "there was some special reason or ground for putting that question to particular jurors called into the jury box for examination." Because "no such exceptional circumstances are disclosed by the record," the Court approved the trial judge's actions, but without further defining what "exceptional circumstances" would justify such a *voir dire* question. 158 U.S. at 415.[10]

The refusal of Judge Gesell, on constitutional grounds, to question the prospective jurors as to their affiliations with the Republican or Democratic parties directly poses the *Connors* question. In the context of this case, are there what the *Connors* decision called "exceptional circumstances" requiring the asking of such political questions? Do the factors here involved, such as the Watergate-related aspect of this case, the partisan political nature of the Segretti material, and the other political overtones of this prosecution, constitute "exceptional circumstances" within the intent of the *Connors* ruling? Are there First Amendment or other constitutional reasons for barring such questions?

The court below practically conceded that the two political affiliation questions "should have been asked," because "of changes in election laws since *Connors.*" See p. 16a, *infra.* Those changes have opened voter

[10] The *Connors* case concerned a charge that the defendant had violated a federal law by carrying away and secreting a ballot box used in an election of a United States Representative.

registration lists to public scrutiny, thus diluting in the view of the court below "the constitutional basis for denial of these particular questions." See p. 17a, *infra*.

Clearly, the likely recurring nature of such *voir dire* questions, as well as the impact of the constitutional considerations on the *Connors* "exceptional circumstances" concept, are matters that support the grant of certiorari on this question. The appropriateness of a grant is in no way lessened by the lower court's avoidance of the problem by reference to the two political questions being "buried in a list of much more questionable ones" and to the "substantial *voir dire* on political bias and prejudice." Reliance on those circumstances only exacerbates the importance of the basic *Connors* problem and the need for a definitive resolution by this Court.

CONCLUSION

For the foregoing reasons, this petition should be granted. Unless this conviction is reviewed, the decision below will remain as a disturbing comprehensive precedent for a loose application of § 1623. And it will then leave a lasting question whether a fair trial can truly be had for one who was only peripherally involved in a highly emotional political crisis unprecedented in the nation's history.

Respectfully submitted,

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